STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA UNION OF SAFETY EMPLOYEES,	)	
Charging Party,	)	Case No. S-CE-238-S
v.	)	PERB Decision No. 619-S
STATE OF CALIFORNIA (DEPARTMENT OF DEVELOPMENTAL SERVICES,	)	April 17, 1987
Respondent.	)	

Appearances; William L. Williams, Jr., Attorney, Peace Officers Research Association of California, for California Union of Safety Employees; Edmund K. Brehl, Attorney, Department of Personnel Administration, for Department of Developmental Services.

Before Hesse, Chairperson; Porter and Craib, Members.

DECISION

HESSE, Chairperson: This case comes before the Public Employment Relations Board (PERB) on exceptions filed by California Union of Safety Employees to the proposed decision, attached hereto, of a PERB administrative law judge (ALJ). In that decision, the ALJ ruled that the principle of collateral estoppel applied to the question of whether Steven Pimentel was unlawfully disciplined by the Department of Developmental Services. Hence, the determination by the State Personnel Board (SPB) that Pimentel's discipline was not unlawful was binding on PERB.

The ALJ correctly relied upon United States v. Utah

Construction and Mining Co. (1966) 384 U.S. 394 and People v. Sims (1982) 32 Cal.3d 468, and fully tested the facts here to the standards set forth in those cases for the application of collateral estoppel.[1] 1

We adopt the ALJ's findings of fact, finding them to be free of prejudicial error. We also concur with his discussion of collateral estoppel, and rule that the doctrine is appropriate in this case for the reasons set forth by the ALJ.

Finally, we agree with the ALJ that the termination of Mr. Pimentel was not motivated by an unlawful intent to retaliate against him for participation in union activities, and, accordingly, adopt the ALJ's findings and conclusions on this issue as well.

ORDER

The complaint in Case No. S-CE-238-S is hereby DISMISSED.

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[1]A petition for a writ of mandamus was filed against the SPB action after the ALJ's decision was issued. We do not believe, however, that the petition for a writ prevents the SPB's decision from being considered "final" for the purpose of collateral estoppel. We concur with the ALJ's reasoning on this point at pages 20-21 of the proposed decision. (See also Traub v. Board of Retirement of the Los Angeles Employees Retirement Association (1983) 34 Cal.3d 793.)

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA UNION OF SAFETY EMPLOYEES. Charging Party. V. STATE OF CALIFORNIA (DEPARTMENT OF DEVELOPMENTAL SERVICES). Respondent.	)	Unfair Practice Case No. S-CE-238-S PROPOSED DECISION (6/12/86)

Appearances: William L. Williams. Jr., Attorney for the California Union of Safety Employees; Edmund K. Brehl. Attorney for the State of California. Department of Developmental Services.

Before Ronald E. Blubaugh. Administrative Law Judge.

PROCEDURAL HISTORY

A union activist was dismissed by a state agency for allegedly falsifying his time records. Ultimately, his punishment and that of three similarly accused co-workers was reduced to a 60-day suspension without pay. All four were reinstated on the order of the State Personnel Board. The union activist here claims that his dismissal was motivated by employer retaliation for engaging in protected conduct and seeks reimbursement for the lost wages.

The state agency defends on both procedural and substantive grounds. Procedurally, the state contends that the alleged retaliation argument was made and lost before the State

Personnel Board and is thus barred here by the doctrine of collateral estoppel. Substantively, the state argues that there is no evidence to link the union activist's protected conduct to his subsequent termination.

The charge which commenced this action was filed on September 26, 1984, by the California Union of Safety Employees (CAUSE). As originally filed, the charge alleged retaliatory conduct by the state in the dismissal of six employees, the four accused of falsifying time sheets, a fifth dismissed for theft and the former supervisor of the department where they all worked.

On November 28, 1984, the Sacramento Regional Attorney of the Public Employment Relations Board (PERB or Board) dismissed the charge as it pertained to all employees except the union activist. With respect to the supervisor, the charge was dismissed on the ground that the PERB has no authority to enforce the provisions of the State Employer-Employee Relations Act (SEERA) which pertain to supervisors. Regarding the other employees, the charge was dismissed on the ground that the charging party had not demonstrated that the employees had engaged in protected conduct of which the employer was aware. These dismissals were upheld by the Board itself in State of California (Department of Developmental Services) (1985) PERB Decision No. 551-S.

On the same day as he dismissed the charge with respect to the other employees, the regional attorney issued a complaint

regarding the termination of the union activist. The complaint alleges that the state employer dismissed Steven Pimentel because of his participation in protected conduct and thereby violated SEERA sections 3519 (a) and (b).[1]

The state answered the complaint on December 19. 1984, denying that its action against Mr. Pimentel was motivated by his participation in protected conduct. At the request of the parties, a hearing in the matter was postponed to allow completion of proceedings before the State Personnel Board. A PERB hearing eventually was conducted on October 21 through 23 and December 9. 1985. At the commencement of the hearing, the respondent filed a motion to dismiss on the theory of collateral estoppel. The motion was taken under submission.

With the filing of post-hearing briefs, the matter was submitted for decision on June 2, 1986.

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[1]Unless otherwise indicated, all references are to the Government Code. The State Employer-Employee Relations Act is found at section 3512 et seq. In relevant part, section 3519 provides as follows:

> It shall be unlawful for the state to:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.

FINDINGS OF FACT

The events at issue took place in the Stockton Developmental Center, a facility for developmentally disabled persons that is operated by the State Department of Developmental Services. The department is a state employer under SEERA. Steven Pimentel, the complainant, is a state employee holding the position of Hospital Peace Officer I at the Stockton center. Hospital peace officers are employed by the department to maintain security and provide police protection at the center. The hospital protective services unit maintains security round-the-clock, seven days a week.

After an investigation that focused on theft, the abuse of time records and other irregularities, the department during the summer of 1984 dismissed six employees from the Stockton protective services unit. The effective date of Mr. Pimentel's dismissal was June 20. 1984. Following a 16-day hearing, an administrative law judge for the State Personnel Board on June 10, 1985. ordered the reinstatement of Mr. Pimentel and the other three officers accused of falsifying time sheets. Each was ordered reinstated with back pay except for a 60-day suspension without pay. The punitive actions ultimately were upheld by the State Personnel Board itself.

Of the four employees who were dismissed for falsifying time sheets. Mr. Pimentel was the only one with a history of union advocacy and leadership. Mr. Pimentel commenced working

for the state in May of 1969, originally at the California Youth Authority. He accepted a position at the Stockton State Hospital, as the developmental center then was known, and went to work there on October 17, 1974. Mr. Pimentel's union activities date from October of 1980 when he joined the Hospital Police Association. In February of 1981, he became a director of the police association and was named interim president. He later was elected president of the association.

Prior to the selection of CAUSE as the exclusive representative of state employee bargaining unit no. 7, the Hospital Police Association became a CAUSE affiliate. Mr. Pimentel toured the state hospitals in the spring of 1981 and campaigned on behalf of CAUSE in the elections for exclusive representative. He also served on the CAUSE board of directors. Mr. Pimentel's activity as an officer and campaigner for both the association and CAUSE was known by department administrators. Beginning in 1981 and continuing throughout the relevant period, Mr. Pimentel was the shop steward for CAUSE at Stockton. Both Harry Olson, the hospital administrator, and Rene Diaz, the assistant administrator, knew of Mr. Pimentel's role as a shop steward.

In addition to serving as an organization officer, Mr. Pimentel also participated in well-publicized union events and represented employees during grievances. In one of his more colorful activities. Mr. Pimentel arranged a bake sale

during October of 1980 as a publicity gimmick to draw attention to the hospital's need for a second patrol car. Ostensibly, the purpose of the bake sale was to raise sufficient funds to purchase an automobile and donate it to the state. But the sale achieved another purpose when The Stockton Record published an article about the novel fund raiser. At the time permission was granted for the bake sale, hospital administrators were unaware of the purported use of the proceeds. They found the subsequent publicity embarrassing and annoying.

Evidence was presented of at least three grievances filed by Mr. Pimentel against actions by various hospital administrators. In December of 1980. Mr. Pimentel filed a grievance against what he understood to be an administrator's directive that an officer abandon an emergency call to handle a routine matter. That grievance was resolved with an understanding that individual officers had the authority to prioritize calls. Both Mr. Olson and Mr. Diaz were aware of this grievance.

In March of 1983, hospital police officers were ordered to conduct random searches of automobiles as they exited hospital grounds. The purpose of the searches was to curtail the theft of state property. Mr. Pimentel was concerned that the searches were unlawful and, as a union representative, he protested the searches. They subsequently were discontinued.

In October of 1983. Mr. Pimentel filed a grievance against a hospital decision to rescind permission for officers to leave hospital grounds for meals. The ban was instituted after an officer off grounds on lunch break arrested a drunk driver who damaged the officer's state vehicle. Due to the arrest and subsequent booking of the drunk driver, the officer was absent from work for a long period that night. Following the grievance, permission to purchase meals off the grounds was reinstated.

Another union activity conducted by Mr. Pimentel was to lobby on behalf of legislation supported by CAUSE but opposed by the Department of Developmental Services. In both 1982 and and 1984 legislation was introduced at the request of CAUSE to transfer hospital peace officer jurisdiction to the State Police. CAUSE believed the change would lead to better training and promotional possibilities for officers. The Department of Developmental Services believed such a change would hamper hospital operations by removing from local administrators all control over the police officers at their facilities. In 1982. the department openly opposed the measures at legislative hearings. In 1984. the governor took a neutral position and so the department did not officially oppose the measures. However, the department's disapproval remained firm and was widely known. Mr. Pimentel's role on

behalf of the legislation was known by Mr. Olson and other department administrators.

The investigation which ultimately led to the termination of Mr. Pimentel and the others commenced with a report in September of 1983 that another officer. Gerald Lee. had removed certain brass items from a house on the hospital grounds. Officer Donald Henderson reported his suspicions about Mr. Lee to Debbie Neri, a special investigator at the Stockton Developmental Center. Specifically. Mr. Henderson reported that Mr. Lee had taken brass locks and keys from a house set aside for use by the executive director. These items were considered to be valuable antiques. Mr. Henderson demanded that his role as an informant be kept confidential because he was fearful about his personal safety should his role become known. Although Ms. Neri promised confidentiality, she promptly disclosed both the information and the identity of her source to Douglas Van Meter, then newly appointed as executive director at Stockton, and Derek Beverly, the department's supervising special investigator.

In early November of 1983. officers armed with a warrant searched Mr. Lee's home for the missing brass items. Shortly thereafter Mr. Henderson began to receive anonymous telephone calls and. fearful for his safety, asked Ms. Neri to see if she could arrange a transfer to another hospital for him. Mr. Henderson linked his fears to George Cross, the supervisor

of the hospital police department, who also was the uncle of Mr. Lee. Mr. Henderson believed Mr. Cross knew he was the informant. Ms. Neri reported Henderson's fears to Mr. Van Meter. Mr. Van Meter, however, was not convinced there was a sufficient reason to arrange a transfer. He said he would have to know what it was about Mr. Cross that made Mr. Henderson fearful.

For some time, Mr. Cross had been regarded unfavorably by a number of department administrators. Bamford Frankland, deputy director of hospital operations for the department, considered the Stockton Developmental Center police to be a slovenly and unresponsive group. He blamed Cross for this condition and considered Cross a lax administrator responsible for the problems in the Stockton police unit. Mr. Frankland had shared these concerns with Mr. Van Meter and told him to supervise the police closely when he took over as executive director at Stockton. Indeed, Mr. Cross had received a warning from another hospital police chief that Mr. Van Meter was going to Stockton to get rid of Mr. Cross.

There is some dispute about what Mr. Henderson was told that he need do in order to secure a transfer. Mr. Henderson testified that he was called to the office of Rene Diaz, the assistant hospital administrator, who said that if

> . . . I gave him two or three good solid things that would initiate an investigation against Chief Cross that he would see to it that I could be transferred or would be transferred to any institution of my choosing in this department.

Mr. Diaz denied telling Mr. Henderson that he could get a transfer only by producing information on Cross. Other administrators also denied making the production of information about Mr. Cross a quid pro quo for a transfer.

Despite the denial by Mr. Diaz, the evidence is persuasive that he or some person with authority held out to Mr. Henderson the inducement of a transfer to elicit information about Cross. On November 30. 1983, Mr. Henderson made a written statement accusing Mr. Cross of carrying a firearm while on duty, in violation of hospital policy. The statement also suggested irregularities in the payment of overtime at Stockton, implicating by name Mr. Pimentel and and another officer. Immediately after signing the statement. Mr. Henderson was told to clear out his locker and wait for further orders. About two weeks later, Mr. Henderson was transferred to Porterville State Hospital. On or about December 12, 1983, Mr. Cross was demoted from chief at Stockton Developmental Center to officer. His "inability to manage his staff" was the principal reason for the reduction, according to Wayne Heine, a former labor relations analyst for the department. Mr. Cross, a union enthusiast who often worked with Pimentel on CAUSE business, blamed his troubles on the department's alleged anti-union attitudes. Mr. Van Meter attributed the Cross demotion to Mr. Cross's method of investigating the renovation of a historical hospital residence.

Mr. Henderson's accusation about overtime abuse led promptly to an examination of the time records, daily logs and monthly attendance reports for protective services employees at Stockton. Hospital Administrator Olson made the initial check and found sufficient evidence of wrongdoing to warrant a thorough examination of records. Chief Investigator Beverly was called in to institute an audit.

What Mr. Beverly discovered was the widespread use of "cuff time," a system of informal compensatory time off for additional time worked. Employees frequently were absent from assigned work schedules in order to take cuff time. However. Mr. Beverly could find no records to establish that the employees were entitled to the compensatory hours they were taking. Moreover, cuff time was not an approved practice at the hospital. He concluded that despite the culpability of the supervisor who permitted the situation, individual employees should have had sufficient common sense to know that they had not kept proper records of their time.

A thorough examination of the records then was made by Dale Stafford, a Personnel Assistant II from the headquarters office of the Department of Developmental Services. In order to determine the hours during which employees were at work, Ms. Stafford relied heavily upon the daily patrol log. At the top of the log is listed the daily work shift. Below are entries about events which occurred during the various patrol

shifts. The document was not designed as an attendance device and its exact uses were never explained to Ms. Stafford before she commenced her analysis. Nor was she advised of the meaning of certain abbreviations used on the log. Thus, for example, she did not know that an officer on "CPR train" was taking authorized cardio-pulmonary-respiratory training. Officers who were absent for such approved purposes were marked as absent without justification on the tabulation sheets which Ms. Stafford prepared during her investigation.

Mr. Beverly accepted Ms. Stafford's analysis at face value and did not check either the assumptions upon which it was predicated nor the arithmetic which produced the totals. Relying upon the Stafford analysis, Mr. Beverly concluded that six officers had falsely billed the state for 866 hours, valued at $8,585.50, that they did not work in 1984. The same officers, he concluded, had falsely billed the state for 1,665 hours valued at $16,384.61 during 1982 and 1983.

Mr. Beverly took the Stafford analysis to the San Joaquin District Attorney for review of whether criminal actions should be instituted against the employees. The district attorney refused to prosecute and suggested that the matter was more appropriate for administrative action by the department.

Dismissal actions were then commenced against all of the employees except for Mr. Henderson. He was granted immunity

because of his role in disclosing information about problems in the police force at Stockton Developmental Center.

During the disciplinary proceeding. Mr. Pimentel was treated no differently than any of the other accused employees. The information against him was neither more reliable nor less reliable than the information against the three others who ultimately were reinstated. When mathematical errors and miscalculations in the analysis were discovered during the Personnel Board hearing the accusations were modified as to Mr. Pimentel as well as the others.

LEGAL ISSUES

1) Is CAUSE barred by the doctrine of collateral estoppel from asserting that the state employer was motivated by unlawful retaliatory intent in discharging Steven Pimentel from his job as a hospital peace officer?

2) If collateral estoppel is not a bar. did the state violate SEERA sections 3519(a) and (b) by discharging Steven Pimentel?

CONCLUSIONS OF LAW

Collateral Estoppel.

The doctrine of collateral estoppel precludes a party to an action from relitigating in a second proceeding matters litigated and decided in a prior proceeding. People v. Sims (1982) 32 Cal.3d 468. 477 [186 Cal.Rptr. 77]. Collateral estoppel is an aspect of, but not coextensive with, the broader

concept of res judicata. "Where res judicata operates to prevent relitigation of a cause of action once adjudicated, collateral estoppel operates . . . to obviate the need to relitigate issues already adjudicated in the first action." Lockwood v. Superior Court (1984) 160 Cal.App.3d 667. 671 [206 Cal.Rptr. 785]. The purpose of the doctrine is "to promote judicial economy by minimizing repetitive litigation, to prevent inconsistent judgments which undermine the integrity of the judicial system, [and] to protect against vexatious litigation." (Ibid.)

Collateral estoppel traditionally has barred relitigation of an issue if (1) the issue is identical to one necessarily decided at a previous proceeding; "(2) the previous [proceeding] resulted in a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the prior [proceeding]." People v. Sims, supra. 32 Cal.3d at p. 484 (citations omitted).

For cases involving the collateral estoppel effect of administrative decisions, the California Supreme Court in People v. Sims, supra, adopted the standards formulated by the United States Supreme Court in United States v. Utah Constr. & Min. CO. (1966) 384 U.S. 394 [16 L.Ed.2d 642, 86 S.Ct. 1545]. There, the United States Supreme Court stated: "When an administrative agency is acting in a judicial capacity and resolved disputed issues of fact properly before it which the

parties have had an adequate opportunity to litigate, the courts have not hesitated to enforce repose." (Id. at p. 422.) Thus, collateral estoppel effect will be granted to an administrative decision made by an agency (1) acting in a judicial capacity. (2) to resolve properly raised disputed issues of fact where (3) the parties had a full opportunity to litigate those issues.

In its motion to dismiss, the state cites the decision of the State Personnel Board which was entered as evidence in the PERB hearing. The Personnel Board administrative law judge, whose decision was upheld by the Personnel Board itself, made a specific finding that Mr. Pimentel was an officer in the union certified as exclusive representative. Moreover, the administrative law judge found. Mr. Pimentel "in the course of his duties as job steward and Officer of the collective bargaining organization, has represented employees in grievances and other matters connected to his position in the union." This finding was in response to a contention by Mr. Pimentel that the "personnel actions were for improper motive, to wit; retaliation for those [union] activities."

Relying upon the California Supreme Court decision in Bekiaris v. Board of Education (1972) 6 Cal.3d 575 [100 Cal.Rptr. 16], the judge concluded that he was required under California law to consider the alleged unlawful retaliation. As an analytical approach, he adopted what he characterized as

the "but for" test found in Martori Brothers v. ALRB (1981) 29 Cal.3d 721 [175 Cal.Rptr. 626] and Mt. Healthy City Board of Education v. Doyle (1977) 429 U.S. 274 [50 L.Ed.2d 471, 97 S.Ct. 568]. Applying that test, the administrative law judge concluded that the action against Mr. Pimentel was "for cause" and "not for official dissatisfaction" with Mr. Pimentel's protected conduct. Moreover, the judge continued, even if the dismissal was in part motivated by improper purposes, the action would have been taken anyway.

The state notes that the Mt. Healthy test subsequently was adopted by the National Labor Relations Board in Wright Line, Inc. (1980) 251 NLRB 1083 [105 LRRM 1169] which in turn was adopted by the PERB in State of California (Department of Developmental Services) (1982) PERB Decision No. 228-S. It is therefore clear, the state asserts, that the precise contention advanced by the charging party here was considered and rejected in the earlier Personnel Board proceeding. Accordingly, the state concludes, the present charge is subject to collateral estoppel and should be dismissed.

CAUSE makes three arguments against the application of collateral estoppel in this case. First, CAUSE asserts that the PERB previously has encouraged litigants to present before the State Personnel Board evidence of anti-union motivation. To now punish a party for following that advice would be an untenable result, CAUSE argues. Second, the elements of

collateral estoppel have not been met here. Third, granting collateral estoppel effect to the decisions of the State Personnel Board would divest the PERB of its jurisdiction over unfair practices.

Regarding PERB's alleged encouragement of parties to raise unlawful motivation issues before the State Personnel Board, CAUSE points to footnote No. 7 in Department of Developmental Services, supra. PERB Decision No. 228-S. There, the PERB cited as "an additional" basis for discrediting the testimony of the charging party his failure to assert before the Personnel Board alleged expressions of threats for union activity. The PERB observed that the charging party's case would have been helped by such evidence at least to the extent of showing bias on the part of the employer's witnesses. The raising of such evidence for the first time in the PERB proceeding rendered it "somewhat suspect." the Board concluded.

As the state responds in its brief, however. Department of Developmental Services has nothing to do with collateral estoppel. It concerns only the credibility of a witness. The PERB's comments in that case shed no light on the issue of whether or not collateral estoppel effect must be granted to Personnel Board decisions under California law. The PERB has yet to consider that question. If the Board ultimately does conclude that collateral estoppel effect must be given to Personnel Board decisions, it may then conclude that tactical

reasons justify a party's failure to earlier raise the motivation argument. In such a context, no inference against credibility could be drawn. See Id. at footnote No. 7. In any event, the PERB's discussion about credibility in Department of Developmental Services is dispositive of no matter at issue here.

CAUSE argues that the PERB already has refused to give res judicata effect to a Personnel Board decision, citing State of California (Department of Transportation) (1984) PERB Decision No. 459-S. However, collateral estoppel was not argued in Department of Transportation and has not been argued in any other case involving a decision by the State Personnel Board. In the most closely analogous case. Regents of the University of California (Berkeley) (1985) PERB Decision No. 534-H. the Board refused to grant collateral estoppel effect to the decision of an arbitrator. There, no showing was made that the issue of unlawful motivation was ever placed before the arbitrator. Thus collateral estoppel would not have been appropriate. Moreover, as the state argues in its brief. Regents stands essentially for the proposition that the PERB does not accord collateral estoppel effect to the decisions of an arbitrator. At issue here is the collateral estoppel effect of decisions made by an administrative agency. There is. therefore, no PERB precedent which runs counter to the granting of collateral estoppel effect to decisions of the State Personnel Board.

CAUSE next argues that several prerequisites for the doctrine of collateral estoppel have not been met. These requirements were set out in People v. Sims, supra. 32 Cal.3d 468. Initially, CAUSE asserts, it has not been established that the identical issue in the present case was litigated before the State Personnel Board. On the contrary, it is clear that both cases present the issue of the motivation underlying the state's termination of Mr. Pimentel.

Ordinarily, the Personnel Board is concerned only with the issue of cause for termination and not the underlying motivation, a quite different question. Here. Mr. Pimentel asserted before the Personnel Board that his termination was in retaliation for engaging in protected conduct. Once Mr. Pimentel made that assertion, the issue of motivation was squarely before and was necessarily decided by the Personnel Board. It is the precise same issue which Mr. Pimentel. through CAUSE, now attempts to relitigate here.

CAUSE next asserts that collateral estoppel is not applicable because the Personnel Board decision is not yet final.[2] CAUSE cites People v. Sims, supra. 32 Cal.3d 468. for the proposition that only judgments which are free from direct attack are final and may not be relitigated. Because

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2Under Government Code section 19630 a decision of the Personnel Board is subject to legal attack for one year. One year has not yet elapsed since the Personnel Board's final action in the Pimentel case.

the Personnel Board decision is still subject to attack through mandamus, CAUSE reasons, it is not yet final and thus cannot be used for collateral estoppel. But People v. Sims, supra, did not resolve the question of whether the time for the filing of mandamus must have elapsed before an administrative agency's decision is final. Because the deadline for mandamus had passed by the time the Sims matter reached the Supreme Court, the Court concluded that it need not decide when an administrative agency's decision becomes final for the purposes of collateral estoppel.

Nevertheless, it is interesting to note that the effect of the Supreme Court's decision in People v. Sims was to uphold a trial court which granted collateral estoppel effect prior to the running of the appeal period. This seems to be the most logical result. To require that the mandamus appeal period must have run would in some cases vitiate the effect of collateral estoppel. Here, for example, an entire year would have to elapse before collateral estoppel effect could be granted to a decision of the Personnel Board. This period would be further lengthened if a mandamus action were commenced on the last day of the time period. Presumably, the decision would not then be final until the last day for appeal from the final action of the highest court to which the mandamus case ascended. If such were the rule, the idea of collateral estoppel for administrative decisions would be stillborn.

It is concluded, therefore, that for the purposes of collateral estoppel effect a Personnel Board decision is final when issued by the Personnel Board itself. Here, the parties stipulated that the Personnel Board has itself issued a final decision in the Pimentel matter. The Pimentel case is therefore final for the purposes of collateral estoppel.

CAUSE next contends that the instant proceeding is not between the same parties or parties in privity with those in the Personnel Board action. Only Pimentel as an individual employee and not as a CAUSE representative was before the Personnel Board. Because their interests are divergent. CAUSE asserts, it cannot be said that CAUSE is in privity with Mr. Pimentel.

This difference in the moving party is inconsequential. Mr. Pimentel. the party in the Personnel Board action, has a clear identity of interest with CAUSE in the case before the PERB. Mr. Pimentel has a direct financial stake in the outcome and the right which CAUSE seeks to vindicate through section 3519(a) is personal to Mr. Pimentel. Section 3519(a) protects the right of individuals, not organizations, to engage in protected activity.

The additional allegation of a violation of CAUSE'S organizational rights is not sufficient to create divergent interests. The alleged violation of section 3519(b) is advanced as a derivative charge. It cannot stand alone. As

the state argues, the organizational right at issue here is one which is exercised only through an officer. As Mr. Pimentel's organizational activity previously was determined not to have been a factor in his dismissal, the prior holding is absolutely dispositive of the alleged denial of organizational rights as well.

As a final line of defense to the collateral estoppel argument. CAUSE asserts that collateral estoppel is precluded where an issue is not within a forum's power to decide in the first action. Here. CAUSE argues. Government Code section 3514.5 gives to PERB the exclusive initial jurisdiction over unfair practice charges under SEERA. Therefore, CAUSE concludes, the Personnel Board was without power to decide whether an unfair practice was committed against Mr. Pimentel.

It is doubtless true that the Personnel Board is without power to decide unfair practice cases. And the Personnel Board did not do so here. What the Personnel Board decided was an issue of motivation which was placed before it by Mr. Pimentel himself. There was no encroachment upon the PERB's jurisdiction. Application of the principle of collateral estoppel does not remove authority from PERB and cede it to the Personnel Board.

It should be noted, finally, that were the PERB to reject out-of-hand the possibility of collateral estoppel effect for decisions of the Personnel Board it would be rejecting also the

explicit suggestion of the California Supreme Court in Pacific Legal Foundation v. Brown (1981) 29 Cal.3d 168 [172 Cal.Rptr. 487]. There, the Court pointed out, conflicts between the jurisdiction of the PERB and that of the State Personnel Board could be "resolved by administrative accommodation between the two agencies themselves." Ibid, at p. 200. The Court then cited with approval an example of administrative cooperation between a civil service commission and a local employment relations commission. Id.

The Personnel Board decision involving Mr. Pimentel meets all the requirements set out by the State Supreme Court in People v. Sims, supra. 32 Cal.3d 468. It is clear that the Personnel Board was acting in its judicial capacity and not under its rule-making authority in the Pimentel case. The Personnel Board decision and portions of the record of that case introduced into the PERB proceeding establish that the hearing was a judicial-like adversary proceeding. It was conducted in an impartial manner with witnesses placed under oath or affirmation. All parties were entitled to call, examine and cross-examine witnesses and to introduce documentary evidence. A formal record was made and a transcript ultimately was prepared. The proposed decision of the administrative law judge contained findings of fact and conclusions of law. It was reviewed by the State Personnel Board itself and adopted. There were disputed issues of fact which were properly raised, fully litigated and resolved.

Granting collateral estoppel effect to such a decision of the State Personnel Board is certainly consistent with the urgings of the Supreme Court.

For these reasons, it is concluded that the charging party is barred by collateral estoppel from asserting before PERB that Steven Pimentel was dismissed on June 20, 1984, in retaliation for engaging in protected activities.[3]

Discrimination.

As a separate and additional grounds for dismissal, it should be noted that even if this charge and complaint were to be decided on the merits, the charging party would not prevail. Although CAUSE has established that Mr. Pimentel engaged in protected conduct, it has failed to establish by a preponderance of the evidence that there is a link between that conduct and the termination.

3under ordinary circumstances, the granting of a motion to dismiss based upon the doctrine of collateral estoppel would obviate the need for a hearing. Here, the motion was distributed to the charging party and the administrative law judge at the start of the hearing on October 21, 1985. This eleventh hour motion was based upon a June 10 Personnel Board decision which counsel for the respondent acknowledged had been in possession of the Department of Personnel Administration since at least August. Prior to October 21, the PERB hearing had been twice cancelled at the request of the parties. On July 10, 1985, the undersigned agreed to continue the hearing until October with a warning that "future requests for continuance will be highly disfavored." When these facts were pointed out to counsel for respondent during a discussion about the late hour of the filing of the motion for collateral estoppel, he agreed that the motion could be taken under submission and dealt with in the written decision.

State employees have the protected right,

> . . . to form. join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations.[4]

It is an unfair practice under section 3519 (a) for the state to "impose . . . reprisals on employees (or) to discriminate . . . against employees . . . because of their exercise of [protected] rights." In an unfair practice case involving reprisals or discrimination, the charging party must make a prima facie showing that the employer's action against the employee was motivated by the employee's participation in protected conduct. Novato Unified School District (1982) PERB Decision No. 210. adopted for SEERA in State of California (Department of Developmental Services), supra. PERB Decision No. 228-S. See also. State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S.

To meet its burden of establishing a prima facie case, the charging party must first show that the conduct in which the employee engaged was protected and that the employer had actual or imputed knowledge of the employee's participation in the protected activity. Moreland Elementary School District (1982) PERB Decision No. 227. The charging party then must produce evidence of unlawful motivation to link the employer's

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4section 3515.

knowledge to the harm which befell the employee. Indications of unlawful motivation have been found in an employer's: general animus toward unions, San Joaquin Delta Community College District (1982) PERB Decision No. 261; disparate treatment of a union adherent. State of California (Department of Transportation) (1984) PERB Decision No. 459-S; inadequate explanation to employees of the action. Clovis Unified School District (1984) PERB Decision No. 389; timing of the action. North Sacramento School District (1982) PERB Decision No. 264; failure to follow usual procedures. Santa Clara Unified School District (1979) PERB Decision No. 104; and shifting justifications for the action. State of California (Department of Parks and Recreation). supra. PERB Decision No. 328-S.

After the charging party has made a prima facie showing sufficient to support an inference of unlawful motive, the burden shifts to the employer to prove that its action would have been the same absent the protected activity. If the employer fails to show that it was motivated by "a legitimate operational purpose" and the charging party has met its overall burden of proof, a violation of section 3519 (a) will be found. See generally, Baldwin Park Unified School District (1982) PERB Decision No. 221.

CAUSE attempts to establish unlawful motivation by showing that the department had a prior plan to terminate Chief Cross for his union activities and then to dismiss the other police

officers because of their loyalty to Cross. While there is persuasive evidence that the department was strongly motivated to get rid of Chief Cross, the root of this motivation was not anti-union sentiments. Department administrators considered the Stockton hospital police to be a slovenly, unprofessional group supervised by a lax administrator.

More fundamentally, this case does not concern Chief Cross. The portion of the charge dealing with him was dismissed and the dismissal was upheld by the Board itself. At issue here is whether the dismissal of Mr. Pimentel was motivated by anti-union sentiments. In order to make this crucial link. CAUSE argues that the department's conduct toward Mr. Pimentel was disparate. But the evidence of disparity is unconvincing. Mr. Pimentel was one of four officers dismissed for the falsification of time records. While it is clear that Mr. Pimentel engaged in protected activity, there is no evidence that he was treated differently from the other three officers who were not union activists.

CAUSE points to the inadequacy of the evidence presented to the Personnel Board regarding Mr. Pimentel's absences from work. It is obvious that some of the employer's documentation was weak. Indeed, some of the accusations were withdrawn by the department during the proceedings before the Personnel Board. But the evidence regarding Mr. Pimentel was no worse than the evidence the department presented against the

employees who were not union activists and who had not engaged in protected conduct. There is, therefore, no showing of disparate conduct in the department's approach to Mr. Pimentel.

In the absence of other evidence of discriminatory intent, it follows that the termination of Mr. Pimentel was not motivated by a desire to retaliate against him for the protected participation in union activities.

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, unfair practice charge S-CE-238-S, California Union of Safety Employees v. State of California (Department of Developmental Services) and the companion PERB complaint are hereby DISMISSED.

Pursuant to California Administrative Code, title 8, part III. section 32305, this Proposed Decision and Order shall become final on July 2, 1986, unless a party files a timely statement of exceptions. In accordance with PERB Regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. See California Administrative Code, title 8, part III, section 32300. Such statement of exceptions and supporting brief must be actually received by the Public Employment Relations Board itself at the headquarters office in Sacramento before the close of business (5:00 p.m.) on

July 2. 1986. or sent by telegraph or certified or Express United States mail, postmarked not later than the last day for filing, in order to be timely filed. See California Administrative Code, title 8. part III, section 32135. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the Board itself. See California Administrative Code, title 8. part III. section 32300 and 32305.

Dated: June 12. 1986

Ronald E. Blubaugh
Administrative Law Judge